No. 15,145

United States Court of Appeals

For the Ninth Circuit

A. W. HARTWIG and JEFF TINGLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Reply Brief of Appellants

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TABLE OF AUTHORITIES CITED

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This reply brief is directed at the contention of the Appellee that the repeal of the Veterans Emergency Housing Act of 1946, by the Housing and Rent Act of 1947, did not extinguish the liability it claims, of the Appellants, under the amended complaint herein. The Appellants now reiterate their contention in their initial brief on this appeal, that the amended complaint herein does not state a cause of action in either of the counts pleaded. And in furtherance of that contention they stand firmly upon the argument made in their initial brief, under Subdivision I thereof, as that argument will be supplemented herein. Furthermore, to epitomize to some extent, the Appellants' supplemental argument submitted herein, their position is that the Appellee, in

its brief, at which this reply brief is directed, has disregarded an applicable and controlling decision of the Supreme Court of the United States, and certain other applicable and settled principles of law, that repudiate Appellee's argument in its entirety.

In the argument in this reply brief there will be some repetition by the Appellants, by quotation, of the language of statutory provisions, mentioned heretofore, that are applicable, to the end that there may be greater clarity on the face of such argument. Thus, in the Housing and Rent Act of 1947, approved June 30, 1947, Congress expressly repealed Sections 1, 2(b) through 9, and Sections 11 and 12, of Public Law 388, Seventy-ninth Congress (the Veterans Emergency Housing Act of 1946) and concluded that piece of legislation as follows:

> "Provided, that any allocations made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of the Act (June 30th, 1947), with respect to Veterans of World War II, their immediate families, and others, shall remain in full force and effect."

The Appellee stands in its argument herein on the claim, in substance, that, under 1 U.S.C. 109, the aforesaid repeal, by Congress, in 1947, of the 1946 statute involved, did not have the effect to release or extinguish any liability incurred under the Veterans Emergency Housing Act of 1946, in that the repealing act does not "so expressly provide." This argument of the Appellee not only disregards the effect of the ruling of the Su-

preme Court of the United States in the case of Hertz vs. Woodman et al., 218 U.S. 205 54 L.Ed. 1001, but it also disregards, contrary to settled law that will be cited later herein, the effect of the above-quoted proviso in the 1947 repealing act.

In the Hertz case, supra, the Supreme Court of the United States, speaking through Mr. Justice Lurton, considers the effect of the Act of Congress 1 U.S.C. 109, on which the Appellee relies. After quoting the statute in question, the Supreme Court has the following to say:

> "This provision has been upheld by this Court as a rule of construction applicable, when not otherwise provided, as a general saving clause, to be read and construed as a part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress" (citing cases).

Among the cases cited is that of Great Northern Railway Company vs. United States 208 U.S. 452, 52 L.Ed. 567. The Court then quotes from the Great Northern Railway Company decision as follows, to-wit:

> "As the section of the Revised Statute in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested *either expressly or by necessary implication* (the italics are ours) in a subsequent enactment. But while this is true, the provisions of Section 13 (the statute under consideration) are to be treated as if incorporated in and as a part of subsequent enactments, and therefore, under the general principles of construction requiring, if possible, that effect be given to all parts of a law, the section must be enforced unless, *either by express declaration or necessary implication, arising from the terms of the law as a whole,* it results that the legislative mind will be set at naught by giving effect to the provisions of Section 13 * * *."

Then, continuing, the Court has the following to say further in the Hertz case, to-wit:—

> "The repealing Act here involved includes a saving clause, and if it necessarily, or by clear implication, conflicts with the general rule declared in Section 13, the latest expression of the legislative will must prevail * * * *. The significance of Section 13 is therefore this: That if, prior to the repealing act, the defendants in error were under any liability or obligation * * * * that obligation or liability was not relieved by the mere repeal of that section, nor as a consequence of the saving clause in the repealing act, unless the special character of that clause, *by plain implication,* cuts down the scope and operation of the general rule in Section 13."

Before continuing the argument in support of the contention of the Appellants herein, attention is called to the case of the United States vs. Carter, 171 F.2d 530, relied upon by the Appellee as supporting its claim that liabilities, under the Veterans Emergency Housing Act of 1946, remained in effect, so that suit could be brought thereon, after the enactment of the Housing and Rent Act of 1947. In the Carter case (and we say this with entire respect to the court involved) the Court cites and quotes the proviso clause in the Housing and Rent Act of 1947 above quoted herein and, then, in disregard of the plain language of the Supreme Court of the United States in the Hertz case, has the following to say, and we emphasize in italics the language of the court in the Carter case to which we take exception as a result of the ruling made in the Hertz case, to-wit:

> "We interpret the foregoing language to be an expression of the intent of Congress to retain in full

> force and effect all orders, commitments, regulations, and remedies relating to veterans' housing which had accrued prior to the date of the 1947 Act. At any rate, the foregoing language is the antithesis of *the express language that Section 109 requires* of a statute in order to repeal pre-existing remedies."

Thus, the Court, in the Carter case, has disregarded the plain language of the Supreme Court of the United States, in the Hertz case, that *express language is not required* to take a statute out from under the provisions of 1 U.S.C. 109, but that the repealing statute may operate to extinguish all liabilities under the repealed statute if the repealing Act brings about this result *"by plain implication."* The Appellants contend (as will be developed in subsequent argument herein) that there is such "plain implication" in the Housing and Rent Act of 1947, and that, accordingly, all liabilities under the 1946 Act were repealed when the 1947 Act was enacted, except only as to the items of liability covered by the saving clause in the 1947 Act, items of liability that do not include the claimed liabilities made the basis, by Appellee, of its amended complaint in the case at bar.

Furthermore, it should be said that this Court, in United States vs. McNair, 180 F.2d 273, cited by Appellee, did not consider a saving clause such as is involved here; and in construing 1 U.S.C. 109 this Court merely quoted portions of the decisions, by the Supreme Court, in the Hertz case, and in the previous case of Great Northern Railway Company vs. United States 208 U.S. 452, 52 L.Ed. 567, where the Supreme Court of the

United States also laid down the doctrine announced in the Hertz case. In so quoting from the Great Northern Railway Company case, Justice Denman, of this Court, used the language therein of the Supreme Court of the United States to the effect that Section 1 U.S.C. 109 (heretofore referred to herein as Section 13) is not to be given effect where *"either by express declaration or necessary implication, arising from the terms of the law, as a whole,* it results that the legislative mind will be set at naught by giving effect to the provisions of Section 13." Thus, this Court has accepted the rule which Appellants contend is applicable in the case at bar.

Appellants contend herein that it appears, *by necessary implication,* from the language of the Housing and Rent Act of 1947, *taken as a whole,* that this repealing act has the effect to release and extinguish the claimed liability under the Veterans Emergency Housing Act of 1946 which the Appellee relies upon, and that, accordingly, its amended complaint herein does not state a cause of action in any of the counts pleaded. In Conn vs. Board of Commrs. (Ind.) 51 N.E. 1062 and 1064, the court lays down the established rule that the implication or inference which may arise in the construction of statutes is of something not expressly declared, but *arises out of* that which is directly or expressly declared in the statute.

It is well to note at this point, that it is fundamental and settled law that all parts, provisions or sections of a

statute must be read considered, or construed together, and that each must be considered with respect to, or in the light of, all the other provisions or sections, and construed in connection, or harmony, with the whole.

82 C.J.S., Statutes, page 694, et seq.

80 Am. Jur., Statutes, paragraph 358.

And in D. Ginsberg & Sons vs. Joseph Popkin, 285 U.S. 204, 76 L.Ed. 704, the Supreme Court of the United States says it is a "cardinal rule" that effect shall be given to every clause and part of a statute.

And in State of California vs. Deseret Water, Oil and Irrigation Co., 243 U.S. 415, 61 L.Ed. 821, the Court says:—

> "The proviso * * * * is an important part of it (the statute to be construed) and, according to a familiar rule, must be given some effect."

In the case at bar the proviso, quoted supra, in the 1947 Act, is all important, Appellants submit, in determining whether "by necessary implication" the said 1947 Act extinguishes the liabilities claimed by the Appellee herein. Thus, we point out, first of all, that, without this proviso clause in the Act, then, under U.S.C. 109, *all liabilities* created by the Veterans Emergency Housing Act of 1946, existing at the time of the 1947 repealing Act, would remain in force, including the items of liability covered by the terms of the said proviso. This being the case, why did Congress add the proviso? The answer to this question is clear, we submit, "by necessary implication" that Congress intended *something* by the

enactment of that proviso, and that *"something"* plainly is that the only liabilities not repealed by the 1947 Act should be the liabilities fixed by the terms of the proviso, which terms are plain and entirely clear. This is simply another way of saying that Congress intended, by the proviso, that, subsequent to June 30, 1947, when the Housing and Rent Act was enacted, no liabilities would be enforcible under the 1946 Act that were not comprehended by the language of the proviso in the 1947 Act. It cannot be argued legitimately that the proviso is without effect or that Congress did a nonsensical thing in adopting the proviso. And it will have to be granted that the members of Congress, who passed the 1947 Act, knew the law to be that a straight act of repeal, without more, would keep all liabilities in effect under the repealed act. Members of Congress also knew (for such is also the law) when they added the proviso to the 1947 Act, that effect would have to be given to the terms of that proviso in construing the said Act, as the authorities, supra, establish. Thus, giving effect to that proviso, as drawn, and as added to the 1947 Act, the plain implication thereof by Congress is that liabilities shall remain in effect in connection with "allocations made or committed, or priorities granted", etc., before the date of the enactment of the Act of June 30, 1947 (as declared in the proviso) but that otherwise (since there is no other enumeration with respect to liabilities in the proviso) no liabilities under the 1946 Act shall remain in force or effect. Hence, there is legal basis for contending, as the Appellants do,

that 1 U.S.C. 109 has no application whatever in the case at bar and that the claimed liabilities, made the basis of the Government's amended complaint herein, have been extinguished and were not in force or effect when this action was brought. To contend otherwise would have the effect of nullifying the aforesaid proviso.

But apart from the intention of Congress, and the plain implications of the proviso in question, it is important to consider the effect of the 1947 statute (the Housing and Rent Act of that year) upon Priorities Regulation No. 33. The Supreme Court of the United States has decided in United States of America vs. Robert Fortier et al. 342 U.S. 160, 96 L.Ed. 179, that *statutory authority* for Priorities Regulation No. 33 was repealed by the Housing and Rent Act of 1947, *except only as otherwise provided in the proviso of the Act,* which proviso, of course, does not relate at all to any of the matters in suit here. Therefore, the contention of the Appellants is that there was no basis in law, when the action at bar was brought, for claiming that the liabilities, made the basis of the amended complaint in the action, did then exist, in that the Veterans Emergency Housing Act of 1946 does not, *alone, in terms or otherwise,* create the liabilities sued upon in the case at bar. In order to establish those liabilities the Government must stand (as it is doing) not only on the Veterans Emergency Housing Act of 1946 but also on Priorities Regulation No. 33. That Regulation (authorized by the 1946 Act) sets forth in detail the provisions of law that

create liabilities in the premises; and that statute and the Regulation are submitted now to the Court, without quotation therefrom, to speak for themselves in this connection and to establish the foregoing as a correct statement of fact and of law. Consequently, since Priorities Regulation No. 33 was nullified as aforesaid by the enactment of the Housing and Rent Act of 1947, and then ceased to exist, as the Supreme Court has decided in the Fortier case, supra, it follows that there is no basis, in law, for the claims pleaded by the Government in the action at bar. This conclusion is warranted by the fact that 1 U.S.C. 109 does not, in terms or otherwise, have any application to Priorities Regulation No. 33. That statute, 1 U.S.C. 109, *relates only to statutes and not to regulations* issued under a statute, and there is nothing whatever in any act of Congress that provides that a regulation, or liabilities created thereunder, shall remain in effect after the regulation has been nullified by an Act of Congress. This state of the law the Appellee has not mentioned in its brief herein.

Thus, in final conclusion, the Appellants contend that, upon both reason and authority, the judgment rendered in the lower Court is erroneous and that, consequently, it should be reversed with directions to dismiss this action.

Respectfully submitted,

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Attorney for Appellants